SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 603

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Eastern District of New York

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY, DEFENDANTS

Statement pursuant to rule 13

On July 31st, 1930, the collector of customs seized the American motor boat "Wanda" with her cargo of intoxicating liquors and apprehended the two members of her crew. Subsequently the "Wanda" was released to the defendant, James A. Mack, herein upon his filing a bond with the collector of customs, pursuant to section 26 of the National Prohibition Act, in the sum of twenty-two hundred ($2200) dollars, a copy of which is annexed to the complaint. Thereafter the members of the crew pleaded guilty to an indictment charging them with transportation and possession of intoxicating liquors in violation of the National Prohibition Act. The defendant, James A. Mack, principal upon the aforesaid bond, failed to return the vessel to the custody of the collector of customs on the day that the crew pleaded guilty to the indictment and were duly sentenced.

On July 19th, 1933, the United States of America filed its
2 bill of complaint to recover upon the aforesaid bond. No answer was interposed by the defendant, James A. Mack. On April 13th, 1934, defendant, James A. Mack, moved to dismiss the complaint herein. On April 25th, 1934, the motion was argued before Honorable Mortimer W. Byers, United States district judge for the eastern district of New York. On May 7th, 1934, Judge Byers rendered a decision granting the motion to dismiss. On May 21, 1934, an order was entered granting the motion to dismiss and directing judgment for the defendant, James A. Mack. On May 23, 1934, the United States filed its notice of appeal, order allowing appeal and assignment of errors. On May 24th, 1934, the citation on appeal was filed in the clerk's office.

The attorneys are:

Louis Halle, office and post-office address, 152 West 42nd Street, New York City, representing the defendant, James A. Mack.

The United States attorney, Howard W. Ameli, appeared by Alfred C. McKenzie, Esq., assistant United States attorney, of counsel, for the Government.

3 In United States District Court, Eastern District of New York

[Title omitted.]

Docket entries

July 19, 1933—Bill of complaint and requisition for summons filed. Summons issued.
July 28, " —Summons returned and filed—Served on defendant—Concord Casualty and Surety Company.
Aug. 25, " —Answer defendant surety filed.
Apr. 13, 1934—Notice of motion filed to dismiss, etc.
Apr. 18, " —Before Byers, J. Hearing on motion to dismiss adjourned to April 25, 1934.
Apr. 25, " —Before Byers, J. Hearing on motion to dismiss argued. Decision reserved—submit May 2, 1934.
May 7, " —By Byers, J. Decision rendered granting motion to dismiss. Settle order.
4 May 21, " —By Byers, J. Order filed and entered dismissing cause without costs.
May 23, " —Notice of appeal, order allowing appeal and assignment of errors filed.
May 24, " —Citation filed.

In United States District Court, Eastern District of New York

[Title omitted.]

Complaint

The plaintiff, United States of America, by Howard W. Ameli, United States attorney for the eastern district of New York, complaining of the defendants herein, respectfully shows to this court and alleges upon information and belief as follows:

First. That at all times hereinafter mentioned, the plaintiff was and still is a sovereign power.

5 Second. That the defendant, James A. Mack, is a resident of Wantagh, Long Island, and that the Concord Casualty & Surety Company was and is a corporation duly organized and existing under the laws of the State of New York.

Third. That on or about the 31st day of July 1930, the collector of customs for the Port of New York apprehended one, Hillary Cathell and Adrian Van Austin, and seized the American motor boat "Wanda" with a cargo of intoxicating liquors for violation of the laws of the United States of America.

By virtue of said arrest, said Hillary Cathell and Adrian Van Austin in connection with the seizure of the American motor boat "Wanda", said persons were duly indicted by the Federal grand jury for the eastern district of New York for the offenses of transportation and possession of intoxicating liquors in violation of the National Prohibition Act.

On or about January 26th, 1931, said Hillary Cathell and Adrian Van Austin pleaded guilty to the charge of possession of intoxicating

liquors and were duly sentenced therefor, and that said possession of intoxicating liquors by said persons was incidental to transportation of said liquors on board the American motor boat "Wanda."

Fourth. That heretofore and on or about the 31st day of October 1930, the defendants herein duly made, executed, and delivered their certain bond in writing to the plaintiff, by which the said defendant James A. Mack as a principal, and the said Concord Casualty
6 & Surety Company as surety, did bind themselves to the plaintiff in the sum of two thousand two hundred ($2,200) dollars, a copy of which bond is hereto attached and made a part of this complaint, and market "Exhibit A."

Fifth. That the condition of said bond was such that if the said principal, the defendant herein, shall return the American motor boat "Wanda" to the custody of the assistant collector of customs for the Port of New York, the officer approving said bond, on the day of the criminal trial of the aforesaid persons apprehended at the time of the sizure of said vessel to abide the judgment of the court, then said obligation to be void, otherwise to remain in full force and effect.

Sixth. That the said principal, James A. Mack, utterly failed and neglected and refused to return said American motor boat "Wanda" to the officer approving the aforesaid bond on the 26th day of January 1931, or on any day since the first day of November 1930, although duly obligated to do so pursuant to the terms of the aforesaid bond.

Seventh. That by reason of the failure of said defendant, James A. Mack, to fulfill the terms and conditions of the aforesaid bond and to return the aforesaid vessel to the custody of the officer approving the aforesaid bond on the day of the criminal trial of the aforesaid persons apprehended at the time of the seizure of said
7 vessel, the terms and conditions of said bond became breached and there is now due and owing by the defendants herein to the plaintiff on account thereof the sum of eleven hundred ($1,100.00) dollars with interest from the 26th day of January 1931.

Wherefore, plaintiff demands judgment against the defendants herein in the sum of eleven hundred ($1,100.00) dollars with interest thereon from the 26th day of January 1931, together with the costs and disbursements of this action.

HOWARD W. AMELI,
United States Attorney,
Eastern District of New York,
523 United States Court House, Brooklyn, New York.

ALFRED C. MCKENZIE,
Assistant U. S. Attorney,
Of Counsel.

[*Duly sworn to by Alfred C. McKenzie, jurat omitted in printing.*]

Exhibit A to complaint

BOND

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE.
Bond No. 10,433.

BOND FOR RELEASE OF VEHICLE OR CONVEYANCE SEIZED UNDER SECTION 26 OF TITLE II OF THE NATIONAL PROHIBITION ACT OF OCTOBER 28, 1919

Know all men by these presents, that I, James A. Mack, of No. 4 Hickory Street, Wantagh, Long Island, N. Y., principal and Concord Casualty and Surety Company, of No. 60 John Street, New York City, a corporation, organized and existing under laws of New York State, surety, are held and firmly bound unto the United States of America in the penal sum of two thousand two hundred and 00/100 ($2,200.00) dollars (double the value of the vehicle or conveyance), money of the United States, for the payment of which well and truly to be made we bind ourselves jointly and severally, our heirs, executors, administrators, successors, and assigns firmly by these presents.

Whereas, the following described vehicle or conveyance has been seized pursuant to section 26 of title II of the National Prohibition Act, to wit: The American motor boat "Wanda."

And, whereas, the aforesaid principal has made application for the return of said vehicle or conveyance, claiming to be the owner thereof:

Now, therefore, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, and the said principal shall pay off any liens or encumbrances thereon except the following liens heretofore existing, namely: then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 31st day of October 1930;

By (Sgd.) JAMES A. MACK,
Principal, Concord Casualty and Surety Company.
By (Sgd.) JOHN A. MANNING,
Resident Vice President.

Attest:

(Sgd.) FRED M. NIELSEN,
Attorney in fact.

Approved this 1st day of November 1930.

(Sgd.) H. C. STUART,
Assistant Collector
(Title of Approving Officer).

Witness our hands and seals this 31st day of October 1930;
(Sgd.) LILLIAN DOWD.
(Sgd.) M. M. JUDGE.

11 In United States District Court, Eastern District of New York

[Title omitted.]

Notice of motion to dismiss

SIR: Please take notice, that upon the annexed affidavit of Milton R. Kroopf, duly verified the 12th day of April 1934, a motion will be made at a motion term of this court to be held in and for the eastern district of New York, at the Post Office Building, Washington and Johnson Streets, Borough of Brooklyn, city of New York, on the 18th day of April 1934, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the above-entitled cause, and for such other and further relief as to this court may deem just and proper.

Dated, N. Y., April 12th, 1934.

Yours, &c.,

LOUIS HALLE,
Attorney for Defendant Mack,
Office and P. O. address, 152 W. 42nd Street,
Borough of Manhattan, city of New York.

To HOWARD W. AMELI,
United States Attorney,
Eastern District of New York.

12 In United States District Court, Eastern District of New York

[Title omitted.]

Affidavit of Milton R. Kroopf in support of motion

CITY OF NEW YORK,
County of New York,
State of New York, ss:

Milton R. Kroopf, being duly sworn, deposes and says: I am an attorney associated with Louis Halle, the attorney for James A. Mack.

That the bond upon which suit was brought in the instant case is a statutory bond given under and pursuant to sections 3 and 26 of the National Prohibition Act.

That the said bond was given in lieu of the American motor boat "Wanda", which was seized for violation of the National Prohibition Act, and held for forfeiture by reason of the said violation.

That the statute under which the said bond was given has become inoperative by virtue of the repeal of the eighteenth amendment of the Constitution. The United States Supreme Court held
13 that all penalties incurred under the National Prohibition Act was released and extinguished by the said repeal and adoption of the twenty-first amendment to the Constitution.

Wherefore it is respectfully prayed that the above entitled case be dismissed.

MILTON R. KROOPF.

Sworn to before me this 12th day of April 1934.

[SEAL] GUSTAVE HALLE,
Notary Public.

Kings Co. Clerk's No. 101, Reg. No. 6096.
Cert. filed in N. Y. Co. No. 242, Reg. No. 6H127.
Commission expires March 30, 1936.

14 In United States District Court, Eastern District of New York

L.—5892

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES A. MACK AND CONCORD CASUALTY & SURETY COMPANY, DEFENDANTS

Howard W. Ameli, Esq., United States attorney, for plaintiff (Alfred C. McKenzie, Esq., asst. U. S. attorney, of counsel).

Louis Halle, Esq., attorney for defendant, Mack (Milton R. Kroopf, Esq., of counsel).

Opinion

MAY 7, 1934.

BYERS, D. J.: Motion for an order of dismissal, made by the surety upon a bond given November 1, 1930, for release of a vessel seized under section 26 of the National Prohibition Act (28 U. S. C., sec. 40).

The undisputed facts are that on July 31, 1930, the collector of customs of this port arrested Cathell and Van Austin, and seized the motor boat "Wanda" while intoxicating liquors were being transported by the former two on the vessel.

On October 31, 1930, the owner of the "Wanda" and the de-
15 fendants above named executed a bond for the release of the vessel, conditioned upon the return thereof on the day of the criminal trial of the individuals so arrested, and the bond having been approved, that vessel was released.

Cathell and Van Austin, having been indicted, appeared in this court on January 26, 1931, pleaded guilty to possession of intoxicating liquors incidental to transportation, and were sentenced.

The vessel was not then produced; nor was it at any time thereafter.

Action was brought at law upon the bond, the complaint having been filed on July 19, 1933, almost two and one-half years after the termination of the criminal proceeding.

There was nothing impetuous about that.

Answer was filed on August 25, 1933, which in effect merely put the Government to formal proof.

The defendant now seeks dismissal because of the repeal of the prohibition law, the argument being that the bond was cancelled in effect by the adoption of the 21st amendment.

If no bond had been given, the vessel would have been subject to forfeiture when the individuals pleaded guilty to the indictment, under the terms of the statute; or the forfeiture could have been sought as the result of a libel filed for that purpose. The Harbour Trader, 42 Fed. (2d) 858.

The forfeiture in either case would have been the result of judicial action independent of the judgment in the criminal cause. No such forfeiture has been had, and could not now be granted; nor could it have been after the effective date of the 21st amendment. U. S. v. Chambers and Gibson, No. 659, October, 1933 term, U. S. Sup. Court.

16 If this is so, it seems to be eqhally true that no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer, can be entered, for otherwise the surety could be held while the res could not.

Motion granted. Settle order.

M. W. B., U. S. D. J.

In United States District Court

[Title omitted.]

Order granting motion to dismiss

May 21, 1934

A motion having come on to be heard before me this 25th day of April 1934, for an order dismissing the complaint in the
17 above entitled cause, now after reading and filing the notice of motion, dated April 12th, 1934, and the affidavit of Milton

R. Kroopf, duly verified the 12th day of April 1934, in support thereof, and after hearing Louis Halle, attorney for the defendant, in support of said motion, by Milton R. Kroopf, Esq., of counsel, and Howard W. Ameli, Esq., United States attorney, by Alfred McKenzie, Esq., of counsel in opposition thereto, and due deliberation having been had thereon, and an opinion having been duly rendered and filed May 7th, 1934, it is hereby

Ordered, that the motion to dismiss the complaint be, and the same hereby is, in all respects granted, and it is

Further ordered, that judgment for the defendant be entered without costs.

MORTIMER W. BYERS,
U. S. D. J.

18 In United States District Court, Eastern District of New York

[Title omitted.]

Notice of appeal and order allowing appeal

The United States of America, feeling itself aggrieved by the final order entered on the 21st day of May 1934, in the above-entitled cause, does hereby appeal from the said order to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors, which is filed herein, and it prays that this appeal may be allowed and that citation issue as provided by law, and that a transcript of the records, proceedings, and papers upon which said final order was based, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated, Brooklyn, New York, May 23rd, 1934.

Yours, etc.,

HOWARD W. AMELI,
United States Attorney,
Eastern District of New York,
523 United States Court House, Brooklyn, New York.

19 To LOUIS HALLE, Esq.,
Attorney for Defendant Mack,
162 West 42nd Street, New York City.

Clerk of the United States District Court for the Eastern District of New York.

The above appeal is hereby allowed.

Dated, Brooklyn, New York, May 23rd, 1934.

MORTIMER W. BYERS,
U. S. D. J.

In United States District Court, Eastern District of New York

[Title omitted.]

Assignments of error

Now, comes the United States of America, and assigns error in the rulings and proceedings of the District Court herein, as follows:

20 1. The court erred in granting the motion of the defendant, James A. Mack, for an order dismissing the complaint herein.

2. The court erred in entering the order dated May 21st, 1934, herein dismissing the complaint and further ordering that judgment for the defendant be entered.

3. The court erred in holding that if no bond had been given, the forfeiture of the vessel would have been the result of judicial action independent of the judgment in the criminal cause.

4. The court erred in holding that if no bond had been given, forfeiture of the vessel could not now be granted nor could it have been after the effective date of the twenty-first amendment.

5. The court erred in holding that "it seems to be equally true that no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer, can be entered, for otherwise the surety could be held while the res could not."

6. The court erred in not holding that when the defendant, James A. Mack, failed to return the vessel to the collector of customs on the day that the crew thereof pleaded guilty to the indictment, the terms and conditions of the bond became breached and the Government's right to forfeiture and to judgment upon said bond became vested.

7. The court erred in not holding that the right of action of
21 the United States of America upon the bond given for the release of the vessel "Wanda" stands independent of any statute.

8. The court erred in not holding that when the defendant, James A. Mack, failed to return the vessel "Wanda" to the collector of customs on the day that the crew pleaded guilty to the indictment, that a right of action in behalf of the United States of America arose upon said bond and that nothing further remained to be done except forfeiture thereof and entering judgment thereon.

Wherefore, the United States of America, appellant, prays that the aforesaid order may be reversed and that it have such other and further releief as may be just and proper in the premises.

Dated, Brooklyn, New York, May 23rd, 1934.

HOWARD W. AMELI,
United States Attorney, Eastern District of New York,
Proctor for Appellant,
523 United States Court House, Brooklyn, New York.

22 [Citation in usual form omitted in printing.]

In United States District Court, Eastern District of New York

[Title omitted.]

23 *Stipulation re record*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above-entitled matter as agreed on by the parties.

Dated, Brooklyn, New York, June 20, 1934.

LOUIS HALLE,
Attorney for defendant, James A. Mack.
LEO J. HICKEY,
United States Attorney.
By ALFRED C. MCKENZIE,
Assistant U. S. Attorney.

24 In United States District Court

Order settling record

On the consent of the attorneys for the respective parties, the foregoing printed record is hereby ordered filed in lieu of the original papers, for the purpose of certifying the record on appeal.

Dated, Brooklyn, New York, June 21, 1934.

MORTIMER W. BYERS,
U. S. D. J.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In United States Circuit Court of Appeals for the Second Circuit

No. 76. October term, 1934

Argued Oct. 16, 1934. Decided Nov. 5, 1934

UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY, defendants

JAMES A. MACK, APPELLEE

Appeal from a judgment of the District Court for the Eastern Eastern District of New York.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

Appeal from a judgement of the District Court for the Eastern District of New York dismissing a complaint in an action upon a bond.

Emanuel Bublick, of Brooklyn, N. Y., for the United States.

Milton R. Kroopf, of New York City, for appellees.

Opinion

L. HAND, *Circuit Judge:* The United States sued Mack and the Surety Company upon a bond executed in the form prescribed by section 26, title 2, of the National Prohibition Act (27 U. S. C. A., § 40), on the thirty-first day of October 1930. The condition read as follows: "The said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court." The occasion for the bond was a seizure in the preceding July by the collector of customs of New York, of the motor boat "Wanda", with a cargo of intoxicating liquors. Those in command of the boat were arrested at the same time, and on January 26, 1931, when brought to trial, pleaded guilty to the possession of the liquor and were sentenced. Mack neglected to return the "Wanda" on "the day of the criminal trial"—January 26—or at any other time, but no proceedings to collect the bond were taken until this action was begun on July 31, 1933. On April 12, 1934, the defendants moved to dismiss the complaint on the ground that judgment could not pass on such a bond after the repeal of the eighteenth amendment, and so the court ruled, relying on U. S. v. Chambers & Gibson, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763, 89 A. L. R. 1510. There are said to be many such bonds held by the Treasury; and the question has been resolved in favor of the United States in the three other cases where it has come up in District Courts. U. S. v. Beigert — F. Supp. — (D. C. N. J. July 7, 1934); U. S. v. E. & S. Transportation Co. — F. Supp. — (D. C. S. D. N. Y. June 1, 1934); U. S. v. Sohn — F. Supp. — (D. C. R. I.). The theory is that although repeal of the amendment ended all power to forfeit the boat, this action is not such a proceeding. Nothing is forfeited, no penalty is exacted; the obligee of the bond merely asks judgment upon a chose in action, now made absolute by the ending of the condition subsequent. Such a "right of action" once "vested" cannot be "divested" by the repeal of a statute or of a constitutional provision, which need not be invoked either to create or sustain it. The fact that except for the amendment the bond would not have been given, is irrelevant; it was executed for a consideration and became a contract by force of the common law alone.

This reasoning might be persuasive, if the plaintiff were
27 right that the obligation needs no support in the eighteenth amendment and depends wholly on the common law. In that event the bond became collectible at once "on the day of the crim-

inal trial", as soon as the principal defaulted in producing the boat. The condition subsequent having then lapsed, nothing stood in the way of immediate recovery; it contained nothing about the conviction of the accused smuggler; it was satisfied when the boat was not forthcoming. It is true that there was another condition, but as the two were in the conjunctive, the lapse of one made the lapse of the other unnecessary. The possibility that the bond might have been collected before conviction, if its meaning be as the plaintiff says, is by no means academic. Criminal trials are often long; bail at times becomes shaky; scire facias is a speedy remedy. A court, if urged, might well have issued the writ and passed judgment, before the prosecution came to an end. If the plaintiff be right, the bail would have had no defense. Yet he would be a hardy suitors who should say, if thereafter the prosecution failed, that he might keep the proceeds, and no court would sustain him. If so, the sovereign's continued power to confiscate must be somewhere implicit in the proceedings, and the action cannot depend wholly on the common law. It may be that the statute so infuses the bond that no action can be brought at all, and no writ of scire facias issue, until conviction; just as no decree of forfeiture can pass until then. If so, it is an answer, for it shows that a statutory penal feature has been added to the common-law consensual face; surely there is no warrant for interposing such an unexpressed condition, if conviction be merely a fact, an event legally neutral, except that it must occur. On the other hand, it may be that the bond is collectible, though the obligee must restore the proceeds if the prosecution fails. That would even more clearly betray the confiscation which lurks behind, for it would be absurd to collect the proceeds after all power to keep them disappears. Less nicely considered, it is apparent that, since the bond was a mere substitute for the arrested boat, the position of the Treasury ought not to be amended by the substitution; that the purpose in allowing the owner to secure immediate possession of his property, must be read as subjecting him to no more onerous conditions than if he had left it under arrest. Whether it be vehicle or bond, a sovereign's power to confiscate must exist; that the suit sounds in contract, that a bond is a "chose in action", cannot disguise the fundamental character of what is done.

In accord is the ancient rule that until the bail is "fixed" he will be exonerated by anything which would discharge the principal from imprisonment were he surrendered; a fortiori by anything which would excuse his surrender. Beers v. Haughton, 9 Pet. 329, 358, 9 L. Ed. 145; Kelly v. Henderson, 1 Pa., 495. He is not necessarily "fixed" by a return of non est inventus to a capias ad satisfaciendum; he may exonerate himself by a surrender until the return day of the last scire facias, when after two "nihils" judgment can be entered. Mannin v. Partridge, 14 East 599. Yet the bond is estreated upon such a return to the ca. sa., as it was here by the principal's default. The decisions relied on by the plaintiff are

quite different. Thus in Pac. Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805, the recovery was based, not on a penal, but a remedial, statute; said to create a "quasi-contract", though that term would scarcely be used to-day to describe the obligation. The right of a pilot to half fees for visiting a ship which did not accept him, was certainly not a penalty; rather it was to compensate him for services thought beneficial to ships in the long run. Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, turned upon a construction of the Constitution of California by which the liability of directors was held to be contractual. In Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773, the statute repealed was compensatory. In White v. Hart, 13 Wall. 646, 20 L. Ed. 685, and Osborn v. Nicholson, 13 Wall. 654, 20 L. Ed. 689, the buyers of slaves, when sued for the price, set up emancipation as a defence. No more was determined than the liability of a buyer upon failure of title after performance. Our decision in U. S. v. Randall, 58 F. (2d) 193, held only that recovery upon a bond under section 26 should be limited to the value of the ship arrested; we did not suggest that the action was not pro tanto a forfeiture. When we said that it was intended as a substitute for the "damage" or "loss" of the United States, we spoke of the loss incurred by failing to collect the penalty, not of any loss involved in the sale or traffic in liquors. There was no such "loss"; forfeiture is a punishment.

Judgment affirmed.

28 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLANT

vs.

JAMES A. MACK, DEFENDANT-APPELLEE

Judgment

Filed Nov. 13, 1934

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

29 [File endorsement omitted].

30 [Clerk's certificate to foregoing transcript omitted in printing.]

31 Supreme Court of the United States

Order allowing certiorari

Filed March 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39,321. U. S. Circuit Court of Appeals, Second Circuit. Term No. 693. The United States of America, petitioner, vs. James A. Mack and Concord Casualty and Surety Company. Petition for a writ of certiorari and exhibit thereto. Filed February 9, 1935. File No. 693 O. T. 1934.

U. S. GOVERNMENT PRINTING OFFICE, 1935

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Statutes:

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above case on November 13, 1934 (R. 29–30), affirming a judgment of the United States District Court for the Eastern District of New York (R. 16–17).

OPINIONS BELOW

The opinion of the District Court (R. 14–16) is reported in 6 F. Supp. 839. The opinion of the Circuit Court of Appeals (R. 27–29) is reported in 73 F. (2d) 265.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 13, 1934 (R. 29–30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the ratification of the Twenty-first Amendment to the Constitution deprived the Government of the United States of its right of action on the bond involved herein, which was executed and delivered pursuant to the provisions of Section 26, Title II, of the National Prohibition Act.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 9–10.

STATEMENT

The facts set forth in the petitioner's complaint (R. 4–10), which was dismissed by the District Court upon motion of the respondent Mack (R. 12–13), may be summarized as follows:

On July 31, 1930, the Collector of Customs of the Port of New York arrested one Hillary Cathell and one Adrian Van Austin and seized the motor boat *Wanda* with a cargo of intoxicating liquors for violation of the laws of the United States (R. 5).

On October 31, 1930, the respondents, as principal and surety, respectively, executed a bond (R. 5–6)

for the release of the vessel, pursuant to the provisions of Section 26, Title II, of the National Prohibition Act, conditioned as follows (R. 9–10):

> NOW, THEREFORE, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, and the said principal shall pay off any liens or encumbrances thereon except the following liens heretofore existing, namely:_____ then this obligation to be void, otherwise to remain in full force and effect.

This bond was duly approved by the Assistant Collector of Customs (R. 10).

On January 26, 1931, Cathell and Van Austin pleaded guilty to the charge of possession of intoxicating liquor and were sentenced. The possession charged was incident to transportation of liquor on the *Wanda*. (R. 5.) The vessel was not

then produced, nor was it produced at any time thereafter (R. 6).

On July 19, 1933, the Government brought suit upon the bond (R. 4). On August 25, 1933, an answer was interposed by the respondent Surety Company (R. 3, 15). On December 5, 1933, the Twenty-first Amendment to the Constitution became effective. On April 13, 1934, the respondent Mack moved to dismiss the suit upon the ground that the statute under which the bond was given had become inoperative by virtue of the repeal of the Eighteenth Amendment, relying upon the decision of this Court in the case of *United States* v. *Chambers et al.*, 291 U. S. 217 (R. 12–13). On May 7, 1934, the motion to dismiss was granted by the District Court on the ground that as no forfeiture of the vessel was had following the pleas of guilty entered by Cathell and Van Austin, and such forfeiture could not be granted after repeal of the Eighteenth Amendment, if the vessel were then before the court, it would seem "to be equally true that no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer, can be entered, for otherwise the surety could be held while the res could not" (R. 16). On May 21, 1934, an order was entered by the District Court, granting the motion and directing entry of judgment for the defendant. (R. 16–17). The judgment was affirmed by the Circuit Court of Appeals (R. 29).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding the doctrine of *United States* v. *Chambers et al.*, 291 U. S. 217, to be applicable to the instant case.

2. In holding that the rights of the Government on the bond in question were no greater than its right of forfeiture of the vessel would be if the vessel were now in possession of the Government.

3. In holding that the bond contemplated the sovereign's continued power to confiscate.

4. In holding that the action does not depend wholly upon the common law.

5. In refusing to hold that, the right to be indemnified under the terms of this bond having accrued prior to the effective date of the Twenty-first Amendment to the Constitution, the enforcement of that right was not dependent upon the continued existence of the National Prohibition Act.

6. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision below appears to be erroneous. We submit that the right to recover under the bond in question was not dependent upon the continued power of the Government to confiscate the vessel, which ceased with the repeal of the Eighteenth Amendment to the Constitution. The bond was conditioned solely upon the return of the vessel to the custody of the approving officer upon the day

of the criminal trial, to abide the judgment of the court, and the only ground for discharge of the bond was impossibility of performance occasioned by act of God, act of the obligee, or act of law intervening before the vessel was to be redelivered to the United States. See *United States* v. *Warnell*, 67 F. (2d) 831 (C. C. A. 5th); *United States* v. *Fiedler*, 45 F. (2d) 874 (E. D. N. Y.); *United States* v. *Stephens*, 1 F. Supp. 33 (S. D. Fla.); *United States* v. *One International Truck*, 3 F. Supp. 898 (E. D. N. Y.); *United States* v. *One Ford Automobile*, 18 F. (2d) 338 (E. D. La.); *The Patricia*, 1 F. Supp. 807 (E. D. N. Y.). When the persons in charge of the vessel were convicted, there then arose the question of whether the vessel might be forfeited and sold. In order to maintain an action *in rem* against the vessel the Government must have had possession of the same. In failing to return the vessel, according to the conditions of the bond, the respondents defeated the jurisdiction of the court to order a sale of the vessel. The criminal case having been terminated by final judgment and sentence, and the respondents having failed to comply with the conditions of the bond, the liability to the Government for the loss of the value of the vessel became fixed, and there arose under the bond a new and distinct obligation, which was fully matured long prior to repeal of the Eighteenth Amendment. See *United States* v. *John Barth Co.*, 279 U. S. 370; *Gulf States Steel Company* v. *United States*,

287 U. S. 32; *United States* v. *Warnell, supra*. That vested contractual rights survive the repeal of the statute under which the transaction arises was held by this Court in *Steamship Company* v. *Joliffe*, 2 Wall. 450, and *Coombes* v. *Getz*, 285 U. S. 434.

The decision of this Court in the case of *United States* v. *Chambers et al.*, 291 U. S. 217, seems clearly to have been intended to apply solely to prosecutions and penalties arising under the National Prohibition Act, and we think the Circuit Court of Appeals erred in holding it applicable to the instant case.

2. While no other Circuit Court of Appeals has passed upon the question here involved, the question has come before three United States District Courts in which the decisions were favorable to the Government.

In the case of *United States* v. *Herman H. Sohn* (D. C. R. I.), decided May 1, 1934, without opinion, the court overruled a demurrer which was based upon repeal of the Eighteenth Amendment.

In the case of *United States* v. *Biegert*, 8 F. Supp. 884 (D. C. N. J.) the court overruled a motion to dismiss a similar suit where the question of repeal was raised by the defendant.

In the case of *United States* v. *E. & S. Motor Transportation Company, Inc.*, 8 F. Supp. 844 (S. D. N. Y.) in which the answer set up the defense of repeal of the Eighteenth Amendment, the court granted plaintiff's motion for judgment. The Cir-

cuit Court of Appeals for the Second Circuit reversed the judgment of the District Court in that case (73 F. (2d) 267).

Neither the case of *United States* v. *Sohn* nor the case of *United States* v. *Biegert, supra,* has gone to judgment; hence no appeal has been taken in either case. While there is as yet no conflict between Circuit Courts of Appeals, there are now pending in the District Courts in other Circuits, particularly the Third and Seventh Circuits, a number of suits on similar bonds in which hearings and decisions are being postponed pending a decision by this Court upon the question involved in the instant case.

3. The Government now has pending 575 vehicle bond cases, involving approximately $400,000, in which similar breaches occurred prior to repeal of the Eighteenth Amendment; of these, 160 cases, involving approximately $160,000, are now in suit in various United States District Courts. A decision by this Court as to the effect of the repeal of the Eighteenth Amendment upon the Government's right of action on these bonds, and the applicability of the *Chambers* case, would greatly facilitate administrative and judicial disposition of these cases and would be in the public interest.

Wherefore, it is respectfully submitted that this petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

FEBRUARY 1935.

APPENDIX

National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 308, 315:

SEC. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented * * *.

(U. S. C., Title 27, Sec. 12.)

* * * * * *

SEC. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or

conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. * * *

(U. S. C., Title 27, Sec. 40.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 6) is reported in 6 F. Supp. 839. The opinion of the Circuit Court of Appeals (R. 10) is reported in 73 F. (2d) 265.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 13) was entered November 13, 1934. The petition for a writ of certiorari was filed February 9, 1935, and was granted March 4, 1935 (R. 14). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, after the repeal of the Eighteenth Amendment to the Constitution, the United States may recover upon a bond, executed pursuant to Section 26 of Title II of the National Prohibition Act, under which a boat seized under that Act had been released to the owner upon the condition that it be returned "on the day of the criminal trial to abide the judgment of the court", where it appears that the boat was not so returned and the crew of the boat had pleaded guilty to the charge of possessing intoxicating liquors as an incident of transportation and had been sentenced, prior to the repeal of the Eighteenth Amendment.

CONSTITUTIONAL AMENDMENT AND STATUTE INVOLVED

The Twenty-First Amendment to the Constitution of the United States (48 Stat. 1749, 1750; U. S. C. A., Constitution, Amendment XXI) provides as follows:

> SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the

Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Section 26 of Title II of the National Prohibition Act, authorizing the execution of the bond in question (c. 85, 41 Stat. 305, 315, Sec. 26; U. S. C., Title 27, Sec. 40), provides as follows:

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon

conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or aircraft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having a circulation in the county once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold

> and the proceeds, after deducting the expenses and costs, shall be paid into the Treasury of the United States as miscellaneous receipts.

STATEMENT

On July 31, 1930, the Collector of Customs of the Port of New York arrested one Hillary Cathell and one Adrian Van Austin and seized the motor boat "Wanda" with a cargo of intoxicating liquors for violation of the laws of the United States (R. 1, 2).

On October 31, 1930, the respondents as principal and surety, respectively, executed a bond (R. 4) for the release of the vessel, pursuant to Section 26, Title II, of the National Prohibition Act (R. 1, 3), conditioned, so far as here material, as follows (R. 4):

> if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court * * * then this obligation to be void, otherwise to remain in full force and effect.

The bond was duly approved by the Assistant Collector of Customs (R. 5).

On January 26, 1931, Cathell and Van Austin pleaded guilty to the charge of possession of intoxicating liquor and were sentenced (R. 1, 2–3). The possession charged was incident to transportation

of liquor on the "Wanda" (R. 3). The vessel was not then produced, nor was it produced at any time thereafter (R. 1, 3).

On July 19, 1933, the Government brought suit upon the bond (R. 1, 2). On August 25, 1933, an answer was interposed by the respondent Surety Company (R. 2). On December 5, 1933, the Twenty-First Amendment to the Constitution became effective (48 Stat. 1750).

On April 13, 1934, the respondent Mack moved to dismiss the suit upon the ground that the statute under which the bond was given had become inoperative by virtue of the repeal of the Eighteenth Amendment, relying upon the decision of this Court in the case of *United States* v. *Chambers,* 291 U. S. 217 (R. 2, 5–6).

On May 7, 1934, the District Court rendered an opinion sustaining the motion to dismiss (R. 6), and on May 21, 1934, an order granting the motion was entered (R. 7). This judgment was affirmed by the Circuit Court of Appeals (R. 13).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding the doctrine of *United States* v. *Chambers et al.,* 291 U. S. 217, to be applicable to the instant case.

2. In holding that the rights of the Government on the bond in question were no greater than its right of forfeiture of the vessel would be if the vessel were now in possession of the Government.

3. In holding that the bond contemplated the sovereign's continued power to confiscate.

4. In holding that the action does not depend wholly upon the common law.

5. In refusing to hold that, the right to be indemnified under the terms of this bond having accrued prior to the effective date of the Twenty-First Amendment to the Constitution, the enforcement of that right was not dependent upon the continued existence of the National Prohibition Act.

6. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

The decision of this Court in the *Chambers* case is limited to a "prosecution" in cases where no final judgment was rendered prior to ratification of the Twenty-First Amendment to the Constitution.

The courts below failed to take account of the difference between an action upon a bond and a criminal prosecution or a forfeiture proceeding and failed also properly to differentiate between the situation where sureties claim to be discharged before liability has arisen under a bond and one in which, as here, defenses are sought to be asserted *after* such liability has become "fixed." In the latter case, defenses available to the defendant upon criminal proceedings are not available to the surety.

It is established that a bond, under Section 26 of Title II of the National Prohibition Act, is con-

tractual in nature, and proceedings to collect after breach of condition do not depend upon the existence of the statute. If entered into for a lawful purpose and for a valid consideration, the liability of a surety upon a bond executed in pursuance of a statute may be enforced as a common-law or contractual obligation. The application of this rule is illustrated in cases where (1) statutes under which bonds have been executed either expire or are repealed, or where (2) the statutes under which bonds have been given are invalid.

Here the bond involved was once admittedly valid, the Government has released the property upon the promise that it would be returned or the Government made whole, and the condition of the bond has been broken while the surety and the principal have accepted the benefits of the contract. They would be unjustly enriched if, as a result of their failure to return the property when due, they are now permitted to become released from their obligation on the bond.

ARGUMENT

I

THE DECISION OF THIS COURT IN THE *CHAMBERS* CASE IS LIMITED TO A "PROSECUTION" IN CASES WHERE NO FINAL JUDGMENT WAS RENDERED PRIOR TO RATIFICATION OF THE TWENTY-FIRST AMENDMENT

In *United States* v. *Chambers*, 291 U. S. 217, this Court held (p. 222) that, upon the ratification of the Twenty-First Amendment to the Constitution,

"the National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support." But this decision was limited (p. 222) to a "prosecution" and this Court excluded from the operation of the decision (p. 226) those cases "where final judgment was rendered prior to . . . ratification" of the Twenty-First Amendment.[1]

II

SINCE LIABILITY UNDER THE BOND HAD ALREADY BECOME "FIXED" UPON BREACH OF ITS CONDITION, THE COURT ERRED IN REGARDING THE DECISIONS INVOLVING DEFENSES PRIOR TO A DEFAULT AS APPLICABLE

The District Court determined (R. 7) that a forfeiture "could not now be granted; nor could it have been after the effective date of the 21st amendment", and hence "no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer; can be entered, for otherwise the surety could be held while the

[1] Both District Courts and Circuit Courts of Appeals have uniformly held that this decision did not operate to discharge prisoners or prevent execution of sentence after the repeal of the Eighteenth Amendment, where the judgment of conviction had become final prior to repeal. *Moss* v. *United States*, 72 F. (2d) 30; *United States ex rel. Voorhees* v. *Hill*, 72 F. (2d) 826; *United States ex rel. Nerbonne* v. *Hill*, 70 F. (2d) 1006; *Ellerbee* v. *Aderhold*, 5 F. Supp. 1022.

rest could not." The Circuit Court of Appeals determined (R. 12) that

> * * * the bond was a mere substitute for the arrested boat, the position of the Treasury ought not to be amended by the substitution; that the purpose in allowing the owner to secure immediate possession of his property, must be read as subjecting him to no more onerous conditions than if he had left it under arrest. Whether it be vehicle or bond, a sovereign's power to confiscate must exist; that the suit sounds in contract, that a bond is a "chose in action", cannot disguise the fundamental character of what is done.

The error of this will be discussed below under Point III, *infra*, p. 12.

The court below also (R. 12) stated:

> In accord is the ancient rule that *until* the bail is "fixed" he will be exonerated by anything which would discharge the principal from imprisonment were he surrendered; a fortiori by anything which would excuse his surrender. (Italics supplied.)

But in the case at bar the liability upon the bond had already become "fixed", and hence decisions regarding the discharge of sureties prior to the default of the principal are not applicable. After the bond has become liable for failure to produce the defendant, "the bail bond is a contract between the sureties and the government" and "the sureties

become debtors." *United States* v. *Davenport*, 266 Fed. 425, 427 (W. D. Texas). See to the same effect *United States* v. *Zarafonitis*, 150 Fed. 97, 99 (C. C. A. 5th); *Joelson* v. *United States*, 287 Fed. 106, 108 (C. C. A. 3d). Accordingly, in such case the surety is not entitled to discharge upon the ground that the principal had valid defenses against prosecution (*United States* v. *Davenport, supra; Archer* v. *Commonwealth*, 51 Va. 627), or that the principal has received a pardon (*Dale & Pollitt* v. *Commonwealth*, 101 Ky. 612; *Weatherwax* v. *Kansas*, 17 Kan. 427; *State* v. *Davidson*, 20 Mo. 212), or that the indictment is invalid or defective (*Southern Surety Co.* v. *United States*, 23 F. (2d) 55, (C. C. A. 8th), certiorari denied, 278 U. S. 604; *Hardy* v. *United States*, 71 Fed. 158 (C. C. A. 8th); *United States* v. *Evans*, 2 Fed. 147 (C. C. W. D. Tenn.); *Bell* v. *State*, 79 Tex. Cr. Rep. 407; *Reeve* v. *State*, 34 Ark. 610), or that the statute of limitations barred prosecution of the principal (*United States* v. *Dunbar*, 83 Fed. 151 (C. C. A. 9th)), or that the indictment was nolle prossed (*Detroit Fidelity & Surety Co.* v. *United States*, 59 F. (2d) 565 (C. C. A. 8th); *United States* v. *Sulvani*, 4 F. Supp. 775) (W. D. N. Y.), or that the indictment was never found (*Kepley* v. *People*, 123 Ill. 367), or that the defendant had died (*Detroit Fidelity & Surety Co.* v. *United States*, 59 F. (2d) 565 (C. C. A. 8th); *United States* v. *Costello*, 47 F. (2d) 684 (C. C. A.

6th)), or that, because of the ratification of the Twenty-First Amendment, the defendant could not be convicted if produced (*United States* v. *Russo*, 7 F. Supp. 391) (E. D. N. Y.).[2]

III

IT IS ESTABLISHED THAT A BOND UNDER SECTION 26 OF TITLE II OF THE NATIONAL PROHIBITION ACT IS CONTRACTUAL IN NATURE, AND PROCEEDINGS TO COLLECT AFTER BREACH OF CONDITION DO NOT DEPEND UPON THE EXISTENCE OF THE STATUTE

The condition of the bond herein was (R. 4) that the principal "return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court . . ." The boat was not returned, and the crew pleaded guilty to the charge of possessing intoxicating liquors; the complaint charges that "said possession of in-

[2] But see *United States* v. *Bryan*, 3 F. Supp. 249. Compare *Taylor* v. *Taintor*, 16 Wall. 366.

In this connection, in holding that "until the bail is 'fixed' he will be exonerated by anything which would discharge the principal", the court below cited *Beers* v. *Houghton*, 9 Pet. 329. That case and other cases cited involve release of debtors upon bond followed by a discharge in bankruptcy. *Beers* v. *Houghton* is not applicable here because this Court there held (pp. 356–358) that the bail was, by the statutes and rules of court, not "completely and definitively fixed" prior to the discharge of the principals. In accord is *Mannin* v. *Partridge*, 14 East 599; but see *Kelly* v. *Henderson*, 1 Pa. St. 495. In the case at bar, the liability on the bond had definitely become "fixed" before the repeal of the Eighteenth Amendment, as will presently be shown in the text.

toxicating liquors by said persons was incidental to transportation of said liquors on board the American motor boat 'Wanda'," (R. 2–3, 1).

Had the boat been produced, it would have been subject to a proceeding *in rem*. *United States* v. *One Ox-5 American Eagle Airplane*, 38 F. (2d) 106, 109 (W. D. Wash.). This could be done "in a summary way in the criminal cause" or "by proceeding upon a separate libel for forfeiture." *The Harbour Trader*, 42 F. (2d) 858, 859–860 (C. C. A. 2d). And see *United States* v. *Bryan*, 3 F. Supp. 249 (S. D. Texas). This is described as "not an original proceeding" but "merely ancillary to the criminal cause." The forfeiture "is not a part of the penalty prescribed for doing the act for which the defendants were convicted; it is a thing that is to follow from the fact of conviction, and is so contemplated by the statute." *United States* v. *One Stephens Automobile*, 272 Fed. 188, 191 (D. Oregon). And, where a bond was given under this statute for the release of property until trial, the contract was held not to be

> for liquidated damages. It was for indemnity. It guaranteed the United States against loss from letting the car out on bond. It obligated the principal and the sureties to make the United States whole against loss. It obligated them no further. * * * [The vehicle] not having been surrendered, the bond stands for the value of what was lost by the failure to surrender, and for no more.

United States v. *Warnell*, 67 F. (2d) 831, 832 (C. C. A. 5th). See to the same effect *United States* v. *Randall*, 58 F. (2d) 193, 194 (C. C. A. 2d); *United States* v. *One Ford Automobile*, 18 F. (2d) 338 (E. D. La.).

The general rule: The general rule is that the liability of a surety upon a bond executed in pursuance of a statute is not dependent upon the existence or validity of the statute. If entered into for a lawful purpose and for a valid consideration it may be enforced as a common-law or contractual obligation. This is illustrated in cases where (1) statutes under which bonds have been executed either expire or are repealed, or where (2) the statutes under which bonds have been given are invalid.

Repeal of statutes: In *United States* v. *Chambers, supra*, p. 223, this Court, upon the authority of decisions in which statutes had been repealed, determined that upon the repeal of the Eighteenth Amendment prosecutions under the National Prohibition Act could not continue. However, in cases where statutes under which bonds have been given are repealed, or expire, the bond is nevertheless held enforceable as a common-law or contractual obligation. *Darling* v. *Peck*, 15 Ohio 65; *Lewis* v. *Stout*, 22 Wis. 234; *Tucker* v. *Stokes*, 11 Miss. 124. And see *Lane* v. *Kusey*, 58 Ky. 410; *State* v. *Nichols*, 22 Ark. 61. A somewhat similar situation is presented where a bond given to secure payment of a tax liability is held enforceable though the lia-

bility for the tax has expired by limitation. *Gulf States Steel Co.* v. *United States*, 287 U. S. 32; *United States* v. *John Barth Co.*, 279 U. S. 370.

Invalid statutes: An even stronger case is presented where a bond is executed under a statute which is held unconstitutional. This Court has held that, where a bond

> is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors.

United States v. *Hodson*, 10 Wall. 395, 409. See to the same effect *Daniels* v. *Tearney*, 102 U. S. 415. This rule obtains generally (*Stevenson* v. *Morgan*, 67 Nebr. 69, 93 N. W. 180; *United States Fidelity & Guaranty Co.* v. *Ettenheimer*, 70 Nebr. 147, 99 N. W. 652; *State* v. *Stark*, 75 Mo. 566; *Southern Surety Co.* v. *Nalle & Co.*, 242 S. W. (Tex.) 197; *Fife* v. *Indemnity Ins. Co. of North America*, 283 S. W. (Tex.) 645; *State* v. *Mundy*, 53 N. D. 249, 205 N. W. 684; *U. S. Fidelity & Guaranty Co.* v. *Henderson County*, 276 S. W. (Tex.) 203; *Love* v. *McCoy*, 81 W. Va. 478, 94 S. E. 954), and applies as well to bail bonds where the statute under which the accused was indicted is unconstitutional (*United States* v. *Du Faur*,

187 Fed. 812 (C. C. A. 7th), certiorari denied, 223 U. S. 732; *People* v. *Rubright*, 241 Ill. 600; *State* v. *Surety*, 49 La. Ann. 909).[3]

The basis of these decisions, it may be noted, is that, having accepted the benefits of the contract, the surety will not be heard to deny its validity.[4]

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[3] A contrary rule seems to prevail in California (*Martin* v. *McCabe*, 21 Cal. App. 658, 132 Pac. 606; *Hampton* v. *Christensen*, 148 Cal. 729, 84 Pac. 200; *Montague* v. *Furness*, 145 Cal. 205, 78 Pac. 640; *San Francisco Lumber Co.* v. *Bibb*, 139 Cal. 192, 72 Pac. 64, and 139 Cal. 325, 73 Pac. 864; *Shaughnessy* v. *American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 700; but see *Peoples Lumber Co.* v. *Gaillard*, 136 Cal. 55, 65 Pac. 576), in New York (*Poole* v. *Kermit*, 59 N. Y. 554; *Brookman* v. *Hamill*, 43 N. Y. 554), and in Indiana (*Byers* v. *State*, 20 Ind. 47; *Cassel* v. *Scott*, 17 Ind. 514; *Marshall* v. *State*, 8 Blackf. 162; but see *State* v. *Lynch*, 6 Blackf. 395; *Spader* v. *Frost*, 4 Blackf. 190).

However, these decisions are distinguishable from the case at bar, for the bond herein was admittedly valid when given and when the breach of condition occurred.

[4] In the decisions, the bonds are also upheld upon the theory that good consideration passed to uphold the contract independently of statute; and the bond must not have been exacted under duress, either where the bond is unauthorized by statute or the statutory requirement is invalid. *United States* v. *Hodson*, 10 Wall. 395, 408; *Daniels* v. *Tearney*, 102 U. S. 415, 420–422. However, in the case now before the Court, the statute was admittedly existing and valid when the bond was given. To secure the release of property rightfully seized and in the possession of the Government, the parties voluntarily gave the bond; the condition of the bond was breached; and Cathell and Van Austin pleaded guilty and were sentenced—all before the Eighteenth Amendment was repealed. Regardless of the distinctions in the cases cited as to duress or the sufficiency of consideration, there was undoubtedly good consideration for the bond herein, and it was not secured by duress.

The case at bar is stronger, for the bond here involved was once admittedly valid, the Government has released the property upon the promise that it would be returned or the Government made whole, the condition of the bond has been broken while the surety and the principal have accepted the benefits of the contract. They would be unjustly enriched if, as a result of their failure to return the property, they are now permitted to become released from their obligation on the bond. The Government has been damaged, for if the vessel had been produced when required it could have been forfeited and sold and the proceeds covered into the Treasury.

Statutory authority unnecessary: Finally, it may be noted that it is not necessary that the bond herein be authorized by any statute. Accordingly, where a bond does not comply with the pertinent statute, it may nevertheless be sustained upon the general authority of the United States to enter a contract. *United States* v. *Hodson,* 10 Wall. 395, 406–408.

The United States may "enter into a contract, or . . . take a bond, in cases not previously provided for by some law." *United States* v. *Tingey,* 5 Pet. 115, 128. To the same effect see *United States* v. *Bradley,* 10 Pet. 343, 359, 360; *United States* v. *Linn,* 15 Pet. 290, 311. Thus, "the procedure to recover on the forfeiture of a bail bond is not controlled by the statutes of any state,

except so far as actions at law are controlled by the state practice, and therefore a debt resulting from the forfeiture of a bail bond for the appearance of a party in a criminal case may be enforced by *scire facias* in the court possessing the record or by an ordinary suit in any other court of competent jurisdiction" (*United States* v. *Zarafonitis,* 150 Fed. 97, 99 (C. C. A. 5th)), and "the courts of the United States may resort to such remedies for enforcing a bond or recognizance * * * as are given by the common law" (*United States* v. *Insley,* 54 Fed. 221, 223 (C. C. A. 8th)).

The courts below, merely because the bond here involved was authorized by Section 26 of Title II of the National Prohibition Act which fell with the repeal of the Eighteenth Amendment, have determined that the bond may not be enforced upon breach of condition occurring during the lifetime of the statute. Illustrative of the lack of substance in the distinctions drawn by the courts below is the fact that the District Court herein, in a subsequent case, has held that a bail bond, given for the return of a defendant held under the National Prohibition Act, "was not given under the prohibition law, and *U. S.* v. *Mack* (D. C.) 6 F. Supp. 839, therefore does not control." *United States* v. *Russo,* 7 F. Supp. 391 (E. D. N. Y.)

It is submitted that—whether Section 26 of Title II of the National Prohibition Act, under which the bond herein was given, is merely directory or

confers a right upon claimants to possession of the property pending trial of the criminal case, upon the execution of a proper bond—the bond became due and collectible as a common-law or contractual obligation, upon breach of the condition thereof, independently of the continued existence or validity of the National Prohibition Act. This has been the result reached by three District Courts *United States* v. *Herman H. Sohn* (D. C. R. I.), decided May 1, 1934, without opinion; *United States* v. *Biegert*, 8 F. Supp. 884 (D. C. N. J.); *United States* v. *E. & S. Motor Transp. Company*, 8 F. Supp. 844 (S. D. N. Y.), reversed, 73 F. (2d) 267 (C. C. A. 2d).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents' argument is predicated upon erroneous premises relating to: (1) the nature of the bond and liability thereon; (2) the necessity for an entry of "forfeiture" upon the bond; and (3) the dependence of the bond upon the validity and continued existence of Section 26 of the National Prohibition Act.

I

In order to bring the situation within the principle of the decision of this Court in the *Chambers*

case, respondents make several arguments as to the nature of the bond and liability thereon.

(1) *Alleged identity of bond and boat.*—Respondents first contend that the "vessel or its equivalent, the bond" are one and the same (Br. p. 3), and that therefore, since one could not proceed to secure a forfeiture against the property after the repeal of the Eighteenth Amendment, there can be no further procedure against the bond.

The idea that the bond takes the place of the boat is borrowed from admiralty law. But admiralty bonds are not similar in character and perform an entirely different function. The ordinary bond or "stipulation" in admiralty stands "merely * * * in place of the vessel itself."[1] But this results from the express condition of admiralty bonds. The bond herein is conditioned upon the return of the boat "on the day of the criminal trial" whereas the typical admiralty bond is conditioned that "the stipulators * * * pay the amount awarded by the final decree."[2] Under

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[1] *The City of Norwich*, 118 U. S. 468, 489. See also *In re Morrison*, 147 U. S. 14, 34–35; *United States* v. *Ames*, 99 U. S. 35, 36; 1 Benedict, Admiralty, 5th Ed., 436, 450–451; Hughes, Admiralty, 2d Ed., 407, 497.

[2] 2 Benedict, Admiralty, 5th Ed., 307–308, and see also pp. 311–312, 315–316, 320–321. There are, of course, certain bonds in admiralty on the arrest of a person similar to the bond herein. *Id.*, pp. 325–326, 328–329. And there are also bonds for the actual return of the vessel. *Id.*, pp. 335, 336–337. In the ordinary admiralty bond, given as a substitute for the vessel, judgment is given against the stipulators. *Id.*, pp. 537–538.

the latter type of bond, the vessel cannot be reseized or rearrested in the same suit.[1]

The bond herein was given, not to take the place of the defendants arrested or the boat seized but to make the United States whole "against loss from letting the [vessel] out on bond" in case it was not returned to the jurisdiction of the court on the day of the criminal trial. *United States* v. *Warnell*, 67 F. (2d) 831, 832 (C. C. A. 5th). Upon breach of the condition of the bond, a right upon contract against the respondents was substituted for criminal proceedings under the National Prohibition Act.

(2) *Nature of liability on bond.*—Secondly, respondents contend that there is "but a claim of liability under the bond just as a claim of liability against a personal offender charged with violation of the National Prohibition Act" (Br. p. 4); that "the amount recoverable" under the bond "is a sum assessed for violating the Prohibition Law" and "involves the idea of punishment for infraction of the law" (Br. pp. 11–12); that the bond was given merely to insure that if a "penalty would ever arise" it then "should be discharged" (Br. p. 13); and that "if the action on this bond * * * survives the repeal then it must be held that the action against the vessel for which the bond had been given would survive the repeal" (Br. p. 6).

Throughout the brief, liability on the bond is characterized as a "penalty." But this merely ig-

[1] 1 Benedict, Admiralty, 5th Ed., 436.

nores the fact that the bond is a contract, and the liability thereon after breach of condition is only that provided by the terms of the contract.

Congress, in Section 26, granted claimants of seized property the valuable right to the return of property in exchange for a guaranty against loss from failure to return the property to the jurisdiction of the court on the day provided. Principal and surety have voluntarily applied for, and secured, a release of the vessel; the condition of this release, as provided in Section 26 of the National Prohibition Act, is that the vessel be returned "on the day of the criminal trial" or the parties be liable in contract "to make the United States whole against loss." *United States* v. *Warnell*, 67 F. (2d) 831, 832 (C. C. A. 5th). See *United States* v. *Biegert*, 8 F. Supp. 884 (D. N. J.). The parties having failed in their undertaking, the liability on their contract has become fixed—and proceedings to enforce that liability are in no way attempts to assess a penalty or impose a punishment.

Respondents are principal and surety only and, as such, obviously could not be the subject of a penalty or punishment under the Prohibition Act; for it is axiomatic that principal and surety can be held only according to the terms of contract, no more and no less.[4] Enforcement of the criminal

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[4] See *Lamphire* v. *State*, 73 N. H. 463, 464; *State* v. *Kinne*, 39 N. H. 129, 135; *Commonwealth* v. *M'Neill*, 36 Mass. 127, 138; *State* v. *Chandler*, 79 Me. 172, 175; *State* v. *Posey*, 79 Ala. 45, 46. The same rule was followed in Texas in

law occasioned the contract here (Br. p. 6), but that fact does not change the nature of the undertaking."

Barrera's Sureties v. *State*, 32 Tex. 644, 651, but the criminal courts of that State are held to have sole jurisdiction in *Jeter* v. *State*, 86 Tex. 555, 557. However, in Pennsylvania, in disallowing a claim for fees by a prothonotary, the court held that an "action on the recognizance was * * * one of a criminal nature." *Commonwealth* v. *County Commissioners*, 8 S. & R. 151, 154.

"The authorities cited by respondents (Br. pp. 11–13) in this connection are inapplicable. *United States* v. *Friedman*, 8 F. Supp. 829, 831, decided by the same trial court that granted the motion to dismiss in the instant case, is inapplicable since there the suit against the surety was for the collection of a tax penalty upon which action was not instituted against the principal until after the repeal of the Eighteenth Amendment; the bond was not executed pursuant to Section 26 of the Prohibition Act; and from the circumstances, the condition thereof (which is not recited in the decision) could not have been comparable to the bond herein. Likewise, in *United States* v. *Springer & Lotz*, 69 F. (2d) 819 (C. C. A. 2d), decided by the court below, the bond was not executed pursuant to Section 26; the point at issue was the statute of limitations rather than repeal of the Eighteenth Amendment; the condition of the bond, as appears in the decision, is not comparable to the bond herein; and the decision turned upon the construction of the condition. In connection with these two cases, the language of this Court in *United States* v. *Barth*, 279 U. S. 370, 375, should be compared: "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had."

O'Sullivan v. *Felix*, 233 U. S. 318; *Lipke* v. *Lederer*, 259 U. S. 557; and *United States* v. *Choteau*, 102 U. S. 603, are obviously inapplicable. *Yeaton* v. *United States*, 5 Cranch 281, does not involve a bond and the decision extends no further in principle than *United States* v. *Chambers*, 291 U. S. 217.

(3) *Alleged "more burdensome conditions" of bond.*—Finally, respondents contend that proceedings against the bond must be subject to the same limitations as proceedings against the vessel "for to hold otherwise, would mean that the bond subjected the owner to more onerous conditions than if he had left the vessel under arrest" (Br. pp. 6, 7). But here again the surety has joined with the principal to secure the release of the vessel, and as a condition to that release has voluntarily substituted a contract in place of summary forfeiture proceedings. The "more onerous conditions" were no more than the conditions of a contract upon valid and subsisting consideration—and, moreover, were voluntarily assumed. The parties understood the nature of contract and the condition of the bond.

But, in any event, the alleged more "onerous" or "burdensome conditions" are not shown here—for, had the principal and surety not executed the bond, the vessel could and in the ordinary course of procedure would have been subject to forfeiture and sale in a summary proceeding "merely ancillary to the criminal cause", following conviction of the defendants arrested when the boat was seized. *United States* v. *One Stephens Automobile,* 272 Fed. 188, 191 (D. Ore.).

II

But aside from the question "whether the res itself was to answer or the bond in lieu thereof" (Br. p. 6), respondents argue that "liability had

not become 'fixed' under the bond" (Br. p. 4), because "there was no order of forfeiture of this bond ever made or entered" (Br. pp. 3, 4, 5, 9, 13), and "no forfeiture can now be granted" (Br. p. 6). The point for which respondents contend is that "the forfeiture, if any, would have to be the result of judicial action independent of the judgment in the criminal cause" (Br. p. 6), and that "some judicial order or decree declaring a default and forfeiture under the bond is the prerequisite to ground a recovery upon the bond at this time" (Br. p. 6). To this line of argument there are two answers:

(1) *The nature of a "forfeiture" on the bond.*—Respondents merely contend that there must be "some judicial order or decree declaring a default", in order to "fix" the liability on the bond. In some systems of procedure, such a declaration of default is sometimes called a "forfeiture" and in some jurisdictions is a prerequisite upon which summary proceedings may be had and upon which *scire facias* may issue.[5]

In this sense, the word "forfeiture" is used as a term of the law of contract, and not as a term of criminal law. "The action to enforce, whether by a *scire facias* or by ordinary suit, does not involve the guilt or innocence, conviction or acquittal, of any party, and therefore it is not a criminal case of any grade * * *" *United States* v. *Zara-*

[5] See 19 Encyclopedia of Pleading and Practice, 312–313.

fonitis, 150 Fed. 97, 99 (C. C. A. 5th).* The argument here seems to be that such a "forfeiture" "under the bond" must have been had before the repeal of the Eighteenth Amendment. But no reason appears why such a mere declaration of default may not be made or entered after repeal, since its only function is to provide a judicial record upon which summary execution upon the bond may be had for a prior breach of condition.

Indeed, there could be no true "forfeiture" here in either the criminal or civil sense, for the right of the Government to obtain a forfeiture under Section 26 requires "not only seizure but continued possession of the vehicle seized." *The Motor Vessel K–22845,* 55 F. (2d) 666, 669 (E. D. N: Y.). Since the boat was not returned, the Government could not proceed against the boat, for "in order to institute and perfect proceedings *in rem,* it is necessary that the thing should be actually or constructively within the reach of the court." *The Brig Ann,* 9 Cranch 288, 290; and see *Miller* v. *United States,* 11 Wall. 268, 294; *Strong* v. *United States,* 46 F. (2d) 257, 260 (C. C. A. 1st).

It would seem clear that a declaration of default or "forfeiture" for a breach of condition occurring before the repeal of the Eighteenth Amendment would simply be one form of procedure to enforce the contract liability and not dependent upon the continued existence or validity of the

* See also note, 10 Am. Eng. Ann. Cas., 293–294.

criminal statute. But in any event, this is not the mode of procedure adopted by the Government herein; instead, the Government has proceeded by simple suit upon the contract.

(2) *Remedy by suit upon the contract.*—Respondents state that "*scire facias* could not issue as there is no record of any court proceedings resulting in a forfeiture upon which *scire facias* might issue" (Br. p. 5). But these are terms of summary procedure, whereas the Government has proceeded to sue upon the contract. Though summary procedure by entry of a declaration of default or "forfeiture" upon which *scire facias* can issue may be proper at least in some jurisdictions, there is undoubtedly also a remedy by suit upon the bond as in the instant case.

Scire facias "is one of the approved common-law methods of enforcing such obligations after a forfeiture is declared, and it has on some occasions been supposed that it was the only appropriate method, although it is now well settled that an original action may also be brought on bonds * * *." *United States* v. *Insley*, 54 Fed. 221, 224 (C. C. A. 8th).[1] "That the United States might have brought an action at law on [a bail]

[1] See to the same effect: *Ewing* v. *United States*, 240 Fed. 241, 250 (C. C. A. 6th); *Iowa* v. *Glass*, 9 Ia. 325, 327; *Commonwealth* v. *Green*, 12 Mass. 1; *State* v. *Cassidy*, 125 Me. 217, 218; *Potter* v. *Kingsbury*, 4 Day (Conn.) 98, 99–100; *Troy* v. *Rogers*, 116 Ala. 255, 260; *Chapline* v. *Robertson*, 44 Ark. 202, 205; *Jennings* v. *Wall*, 217 Mass. 278, 284; 19 Encyclopedia of Pleading and Practice, 293, 305.

bond cannot be doubted, for the king may maintain any action adapted to his case which a subject under like circumstances might maintain." *Ewing* v. *United States,* 240 Fed. 241, 250 (C. C. A. 6th). Indeed, action upon the bond may be had where "the libel of forfeiture filed before the car was bonded was dismissed." *United States* v. *Warnell,* 67 F. (2d) 831, 832 (C. C. A. 5th). And where the United States, in attempting to invoke summary procedure, applies "for an order directing the forfeiture of a bond" given for the release of a vessel seized under the Prohibition Act, the court may deny the motion and remit the Government "to its action upon the bond", if it is of the opinion "that a full and fair disclosure of the facts" is desirable. *The Patricia,* 1 F. Supp. 807, 808 (E. D. N. Y.). It may be noted, furthermore, that the court below in *Fidelity & Deposit Company of Baltimore* v. *United States,* 74 F. (2d) 296, now pending in this Court upon application for certiorari, No. 787) reached the same result as it did in the instant case, though the record in that case shows that the trial court on January 16, 1922, had entered an order of forfeiture.

Clearly, no entry of order of default or "forfeiture" is prerequisite to suit upon the bond herein.

III

Finally, respondents contend that "This is the purest type of statutory bond, each condition contained therein conforming with the statutory requirements of Sec. 26" (Br. p. 10, 7–8), that such a

bond "under Section 26 is dependent upon the continued validity of that statute" (Br. p. 9), and that "With the repeal of the Eighteenth Amendment, the basic right to exact a bond under Sec. 26 is lost." (Br. pp. 5–6.)

However, Section 26 of the National Prohibition Act merely authorizes officers of the United States to release property upon bond, confers a right upon claimants of property to secure a release thereof upon furnishing a proper bond (*The Lynx II*, 14 F. (2d) 697 (S. D. N. Y.)), and fixes the condition of such a bond. But a bond voluntarily given for good consideration does not depend upon the existence of statute, though occasioned and executed pursuant to the terms of some statute. The error of respondents' argument is apparent in the light of the authorities set forth in the Brief for the United States, pages 14–19.[8]

This cause arises upon motion to dismiss upon the sole ground "that the statute under which the * * * bond was given has become inoperative by virtue of the repeal of the eighteenth amend-

---

[8] To the decisions cited in the Brief for the United States on the general rule prevailing in State as well as Federal courts there may be added the following decisions: *State* v. *Cochrane*, 264 Mo. 581; *State* v. *Cannon*, 34 Ia. 322.

And compare the language of this Court in *United States* v. *Barth*, 279 U. S. 370, 375: "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had."

ment of the Constitution" and that "all penalties incurred under the National Prohibition Act was released and extinguished by the * * * repeal and adoption of the twenty-first amendment to the Constitution" (R. 5, 6). In this proceeding no questions arise as to the measure of recovery (Br. pp. 5, 10–11). The decision in *United States* v. *Bryan*, 3 F. Supp. 249 (S. D. Tex.), from which respondents quote extensively (Br. pp. 10–11), was rendered admittedly "to an extent following the practice in admiralty" (p. 250) and there were extenuating circumstances as well as a showing of "'good cause' * * * why no recovery should be had" against the principal and his sureties upon the bond (p. 251); in short, that case involved the proof of a defense, which the trial court held sufficient, rather than a motion to dismiss for fatal defect in the cause of action.

It is respectfully submitted that the judgment below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES A. MACK and CONCORD CASUALTY AND SURETY COMPANY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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UNITED STATES OF AMERICA,
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JAMES A. MACK and CONCORD CASUALTY AND SURETY COMPANY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition For The Writ Ought Be Denied.

I.

The repeal of the 18th Amendment and the adoption of the 21st Amendment without a saving clause respecting any of the provisions of the enforcement acts, to wit: The National Prohibition Act, extinguishes all claims of forfeitures, penalties or damages which may have arisen by the breach of such statutes, prior to their repeal and upon which final adjudication has not been made.

U. S. v. *Chambers et al.*, 291 U. S. 217, 54 Sec. 434, 78 L. Ed. 763;
Matoil Service & Transportation Co. v. *U. S.*, 72 Fed. (2nd) 772;
Certiorari denied.

II.

The rights of the Government on the bond in question were no greater than its right of forfeiture of the vessel if the vessel were in possession of the Government at the time suit was instituted on the bond. Forfeiture of the vessel contemplated the sovereign's continued power to confiscate. The action on the bond could be resisted by a showing of good cause why the vessel should not be forfeited. This right was saved to the claimant as owner of the property under the specific provisions of Section 26 of the National Prohibition Act. Under the bond in question, the Government could suffer no greater damage than the tainted interest of the owner of the vehicle and if bona fide lienors intervened, their rights would be superior to the Government's. In short, the measure of the penalty to be inflicted against the vessel or vehicle for which the bond is given under Section 26 is measured by the provisions of Section 26 without which statute the relative rights of the government and the claimant cannot be determined. *U. S.* v. *Warnell,* 67 F. (2) 831. Except for the 18th Amendment, the bond would not have been given.

III

All penalties and forfeitures incurred by reason of the existence of the National Prohibition Act were, in effect, remitted by the repeal of the 18th Amendment and adoption of the 21st Amendment without a saving clause.

Chief Justice TANEY, observed in

> *Maryland Use of Washington County* v. *Baltimore & Ohio R. R. Co.,* 3 How. 534, 552, 11 L. Ed. 714, 722:
>
> "The repeal of the law imposing the penalty is of itself a remission."

In the *Chambers* case, *supra,* Chief Justice HUGHES quoted the above language with approval.

IV.

The bond in question is a statutory bond dependent entirely upon the continued validity of Section 26 of the National Prohibition Act.

U. S. C. Title 27, Section 40.

V.

The collection on the bond in question may be resisted only by defenses which are available by reason of the statutory provisions of Section 26, without which statute defenses are lost and unavailable. It is error to suppose that the bond in question is a contractual obligation independent of the National Prohibition Act. Not alone are its terms commanded by the provisions of Section 26, but it is only by virtue of that statute that the bond itself might be exacted. Only by virtue of Section 26 may the owner of the property re-possess himself by giving a bond in accordance with the terms of that statute so that he might hold the property *pendente lite.* Whether that bond will become forfeited or not depends upon the facts and circumstances under which the property for which the bond had been given had been seized and upon the interest of the claimant and whether he can show good cause to have the same restored to him. These rights are preserved by the statute which gives the bond validity. Any attempt to divorce these proceedings from the National Prohibition Act and more particularly, from the forfeiture provisions of Section 26, seems in vain.

As stated by the Circuit Court of Appeals (Record 28):

> "On the other hand, it may be that the bond is collectible, though the obligee must restore the proceeds if the prosecution fails. That would even more clearly betray the confiscation which lurks behind, for it would be absurd to collect the proceeds after all power to keep them disappears. Less nicely

considered, it is apparent that, since the bond was a mere substitute for the arrested boat, the position of the Treasury ought not to be amended by the substitution; that the purpose in allowing the owner to secure immediate possession of his property, must be read as subjecting him to no more onerous conditions than if he had left it under arrest. Whether it be vehicle or bond, a sovereign's sounds in contract, that a bond is a 'chose in action,' cannot disguise the fundamental character of what is done.

In accord is the ancient rule that until the bail is 'fixed,' he will be exonerated by anything which would discharge the principal from imprisonment were he surrendered; a fortiori by anything which would excuse his surrender.

Beers v. *Haughton,* 9 Pet. 329, 358, 9 L. Ed. 145; *Kelly* v. *Henderson,* 1 Pa. 495."

VI.

The petitioner relies upon certain additional authorities not pressed in the Court below. In none of these cases was the question of the fact of the repeal of the 18th Amendment urged or considered. However, the importance of the provisions of the bond as effected by Section 26 is evidenced throughout the opinion in

U. S. v. *Warnell,* 67 Fed. 2nd, 831.

In *U. S.* v. *Barth,* 279 U. S. 370, a case not even remotely touching the question in the case at Bar, this Court stated:

"The object of the bond was not only to prevent the immediate collection of the tax, but also to prevent the running of time against the Government."

Gulf States Steel Co. v. *U. S.,* 287, U. S. 282, likewise has no application, for there too, this Court stated that the bond was given for the express purpose among other things, to delay the collection of the tax and therefore, it was held, that the statute of limitations could not bar the right of the

Government. The statute of limitations is not involved in the case at Bar. However, the distinction between the statute of limitations being invoked as a shield, and the loss of jurisdiction, right, and power by virtue of the repeal of a statute is too evident to require discussion. Furthermore, the delay in the case at Bar was wholly occasioned by the Government's own inaction. There never was a forfeiture decree in any libel proceedings against the vessel, nor was any order of forfeiture decreed in the criminal cause after the plea of guilty of possession in transportation was entered. The action was brought on the bond almost two and one-half years after the termination of the criminal proceedings and as the District Court observed,

> "There was nothing impetuous about that."

The learned Circuit Court of Appeals in its opinion distinguished the authorities relied upon by the Government and concludes:

> "When we said that it was intended as a substitute for the 'damage' or 'loss' of the United States, we spoke of the loss incurred by failing to collect the penalty not of any loss involved in the sale or traffic in liquors. There was no such 'loss'; forfeiture is a punishment."

Wherefore, it is respectfully prayed that the petition for a writ of certiorari be denied.

Respectfully submitted,

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on the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Opinions Below.

The opinion of the District Court (R. 6) is reported in 6 F. Supp. 839. That of the Circuit Court of Appeals (R. 10) is reported in 73 F. (2) 265.

Jurisdiction.

The petition for a writ of certiorari was filed February 9, 1935 and granted March 4th, 1935 (R. 14). Jurisdiction of this court is invoked under Sec. 240-a of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether, after the repeal of the Eighteenth Amendment to the Constitution, the United States may recover upon a bond, executed pursuant to Sec. 26 of Title II of the National Prohibition Act, under which a boat seized under that Act had been released to the owner upon the condition that it be returned "on the day of the criminal trial to abide the judgment of the court," where it appears that the boat was not so returned and the crew of the boat had pleaded guilty to the charge of possessing intoxicating liquors as an incident of transportation and had been sentenced, prior to the repeal of the Eighteenth Amendment.

Statement.

The brief for the United States contains a full, fair and comprehensive statement and for that reason such is omitted here, except to refer to the full conditions of the bond which are as follows:

Now, therefore, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, * * *.

Summary of Argument.

1. There was no final judgment ever obtained in the within cause.

2. Liability had not become "fixed" under the bond in suit.

3. The bond admittedly executed under Sec. 26 of the National Prohibition Act, is dependent upon the continued validity of that statute.

4. The complaint fails to allege sufficient facts upon which to base a recovery as delivery of the vessel was not a condition absolute of the bond. Payment, in the event of order of sale, without delivery of the vessel would discharge the bond. This, irrespective of the repeal of the Eighteenth Amendment to the Constitution of the United States.

POINT I.

No final judgment was obtained in the within cause prior to ratification of the Twenty-first Amendment.

There was no order of forfeiture of this bond ever made or entered. There was no judgment or decree ever entered with respect to the vessel released under this bond. The petitioner sought to obtain judgment by commencing an action on the bond more than two and one-half years after the criminal phase of the seizure was disposed of by a plea of guilty.

The petitioner's argument under Point I (Brief, p. 8), pre-supposes the existence of a final judgment. The complaint alleges no final judgment of forefeiture with respect to the bond in suit. In fact, the cause in the case at bar was the *modus operandi* by which the petitioner sought to procure a final judgment. Plainly, this is not a case in which a final judgment had been obtained against a vessel or its equivalent, the bond, prior to ratification of the Twenty-first Amendment. No judgment at all had been obtained, and while this cause was still pending, the Twenty-first Amend-

ment to the Constitution was ratified. The effect of that ratification without a saving clause extinguished all claims of liability or forfeiture under the National Prohibition Act.

U. S. v. *Chambers,* 291 U. S. 217.

POINT II.

Liability had not become "fixed" under the bond in suit.

There is but a claim of liability under the bond just as a claim of liability against a personal offender charged with violation of the National Prohibition Act. Unless final judgment in the sense that no right of appeal exists was obtained, the intervention of the ratification of the Twenty-first Amendment deprives the court of jurisdiction.

In the absence of judgment of forfeiture, the following cases cited by the Government are distinguishable from the case at bar:

U. S. v. *Davenport,* 266 Fed. 425;
U. S. v. *Zarafonitis,* 150 Fed. 97;
Joelson v. *U. S.,* 287 Fed. 106;
Southern Surety Co. v. *U. S.,* 23 F. (2) 55;
Hardy v. *U. S.,* 71 Fed. 158;
U. S. v. *Evans,* 2 Fed. 147;
U. S. v. *Dunbar,* 83 Fed. 151;
Detroit Fidelity & Surety Co. v. *U. S.,* 59 F. (2) 565;
U. S. v. *Sulvani,* 4 Fed. Supp. 775.

Those cases, without a single exception, present a fact situation in which a judgment of forfeiture upon the recognizance was duly had and entered. Such proceedings as were had thereafter in those cases were in execution of the judgment duly had and entered.

In the case at bar, as pointed out under Point I hereof, no judgment of forfeiture was ever declared or entered.

There was no forfeiture of this bond nor of the vehicle for which it was given established in any cause and such fact therefore is not pleaded in the complaint. There is no similarity between the bond in the case at bar and a bail bond given in a criminal proceeding for the appearance of the accused.

U. S. v. *Russo,* 7 Fed. Supp. 391;
U. S. v. *Randall,* 58 F. (2) 193.

Furthermore, *scire facias* could not issue as there is no record of any court proceedings resulting in a forfeiture upon which *scire facias* might issue. The mere failure to deliver the vessel would not ground forfeiture of the bond even if duly prayed for, for two conditions are still absent; (a) notice to the surety, and (b) conviction for transportation under Sec. 26 of the National Prohibition Act.

In any event, mere failure to return, not to the court but to the officer approving the bond is a non-compliance with Sec. 26 with the resultant necessity for the Court's adjudication in order to fix the penalty, which must be measured by the guilty participation of the owner or claimant. This is not necessarily the face value or half the face value of the bond, judgment for which had never been granted nor prayed except by the present suit.

The owner may be innocent, and his failure to deliver the vessel may be explained, and a forfeiture might never be had, or if had, could only be obtained as the result of a determination upon issues properly presented to the court for adjudication.

The Patricia, 1 Fed. Supp. 807.
U. S. v. *Bryan,* 3 Fed. Supp. 249.

With the repeal of the Eighteenth Amendment, the basic right to exact a bond under Sec. 26 is lost; the right to incur

forfeiture under Sec. 26 is gone. How then may the bond stand unless the statute survived the repeal by a saving clause? *If the action on this bond given under Sec. 26 survives the repeal then it must be held that the action against the vessel for which the bond had been given would survive the repeal, for to hold otherwise, would mean that the bond subjected the owner to more onerous conditions than if he had left the vessel under arrest.*

The fallacy of the Government's position is that it loses sight of the fact that whether the res itself was to answer or the bond in lieu thereof, the forfeiture, if any, would have to be the result of judicial action independent of the judgment in the criminal cause.

U. S. v. *Ames*, 99 U. S. 35 at pages 40, 41.

Obviously, no forfeiture can now be granted. Furthermore, the Government loses sight of the fact that except for the Eighteenth Amendment, the bond would not have been given; the vessel would not have been seized and the arrest would not have been made.

That the Government might have collected upon the bond if proceedings were pressed timely and diligently is beside the point. Certainly, some judicial order or decree declaring a default and forfeiture under the bond is the pre-requisite to ground a recovery upon the bond at this time. The cases cited in the Government's brief have no application to the case at bar. If the action were dependent wholly upon the common law, *scire facias* could only issue if a forfeiture was judicially declared upon the bond.

Detroit Fidelity & Surety Co. v. *U. S.*, 59 F. (2) 565.

There, the Court states:

> "The question as to whether or not any liability accrued against the libellant must be determined by

> the conditions existing at the time of the default *and the adjudication of forfeiture was a final judgment,* at least to the extent of a declaration that there had been a default or breach of the conditions of recognizance. The scire facias proceeding is but a continuation of the forfeiture proceeding insofar as the adjudication of forfeiture is concerned, • • •."

But the action is not dependent wholly upon the common law, for if there were no conviction in the criminal cause the power to keep the proceeds would disappear (after determination of the extent of the tainted interest of the claimant) and the jurisdiction would fail, for Sec. 26 provides, so far as pertinent:

> "The court *upon conviction* • • •, unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized • • •."

As the Circuit Court of Appeals stated (Record, p. 12):

> "It may be that the statute so infuses the bond that no action can be brought at all and no writ of scire facias issues *until conviction; just as no decree of forfeiture* can pass until then." (Italics ours.)

If the Government's position is correct, then the owner in securing possession of the property is subjected to more burdensome conditions than if the property were left in the custody of the seizing officer, for in the latter case, the intervention of the Twenty-first Amendment would save the property for him, while in the former, the bond would be forfeitable if only the property had not been delivered to the officer on the day of trial.

The fallacy of this argument seems apparent, for the very condition of the bond is commanded by the statute. If the bond were treated purely as a contract, the owner might offer the value of the vessel to the officer at this time, but no

order condemning the proceeds could be entered under Sec. 26.

The suit is brought on a statutory bond and the bond must be considered in the light of the requirements of the statute which gives it force and effect. The bond receives its construction both as to remedy and liability in the language of the statute pursuant to which the bond was exacted. That it is not a common law bond is practically conceded by the question presented for review.

The bond was

> "executed pursuant to Sec. 26 of Title 2 of the National Prohibition Act." (Government's Brief, p. 2.)

As stated in Corpus Juris, Vol. 9, Sec. 41, page 27:

> "Moreover, in order to uphold a bond as a valid common law obligation on which a recovery may be had as such, it must be done independently of the statute by the authority of which it was intended to be executed."

And as stated in Corpus Juris, Vol. 9, Sec. 43, page 28:

> "If the bond is dependent for consideration entirely on the validity of the statute, it becomes invalid when the statute is annulled and is not valid as a common law bond."

The Congress has done more than to invalidate the statute. By omitting a saving clause from the repealer it has, in effect, remitted all fines, penalties and forfeitures.

U. S. v. *Chambers, supra.*

There is no vested right to collect a penalty or to confiscate property pursuant to a forfeiture in proceedings had under the National Prohibition Act unless judgment became absolutely final and the time within which to appeal has

definitely expired. All penalties and forfeitures incurred by reason of the existence of the National Prohibition Act were, in effect, remitted by the repeal of the 18th Amendment and the adoption of the 21st Amendment without a saving clause. The very force and effect of a remission of a penalty is the surrender of that which the Government might have been justly entitled to, but which the Congress has declared it may not now exact.

POINT III.

A bond under Section 26 is dependent upon the continued validity of that statute.

It is conceded that the bond was given under Sec. 26 of the National Prohibition Act. That bonds given pursuant to statutes are construed in the light of the statute under which it was given needs no citation of authority. The rights and remedies are governed by the language of Sec. 26. **There was no order of sale of the vessel seized in the case at bar entered at the time of conviction of the persons arrested. There was no notice of intention to try the issue with respect to the title to the vessel.**

As stated in

U. S. v. *One Stephens Automobile,* 272 Fed. 188 at 190.

> "The order of sale would seem to follow automatically upon conviction. There is no provision for a trial touching the rights of claimants to the property at the time of the trial of the person arrested. In fact, such a hearing would seem to be collateral to any issue as to the guilt of the person arrested. No notice of the seizure of the property is provided by which to preclude parties interested therein, unless it be that the seizure itself is deemed sufficient for the purpose. If the seizure is to be deemed suf-

ficient, why provide later for advertising the sale in case no one shall be found claiming the property, and opportunity for claimants to appear in pursuance of the advertisement?

It is manifest that there is lack of definite procedure prescribed applicable in the first instance by which to determine the relative rights of all parties concerned in the property, so as to preclude them at once and for all time from further claiming any interest therein."

If the Government were to recover on the bond in suit, the measure of liability and the extent of recovery could only be determined by fixing the extent of the interest in the vessel which was tainted with guilty participation by the owner. This necessarily must be adjudged in accordance with the provisions of Sec. 26 of the National Prohibition Act.

U. S. v. *Warnell,* 67 F. (2) 831;
U. S. v. *Randall,* 58 F. (2) 193;
U. S. v. *One Ford Automobile,* 18 F. (2) 338.

This is the purest type of statutory bond, each condition contained therein conforming with the statutory requirements of Sec. 26.

Nor is the mere recital in the complaint of the failure of the principal to return the boat on the day of trial sufficient to establish a forfeiture of the bond and liability thereunder.

U. S. v. *Bryan,* 3 Fed. Supp. 249 at 250:

"The Government contends that, upon offering in evidence the bond, and proof of failure of Bryan to return the car on or before the day of the criminal trial, it is entitled to judgment.

Bryan (and his sureties) claims that the Government must go further and make the same proof it would require to make in a proceeding in rem to for-

feit the car, i. e., to prove, (a) the transportation of intoxicating liquor in the car, (b), the seizure of the car, (c), the arrest and conviction of the person or persons in charge of the car.

Bryan (and his sureties) also contends that they may show 'good cause' in this case and prevent judgment against them, in the same manner that Bryan, as the owner of the car, may show 'good cause' and prevent a judgment of forfeiture of the car in such a proceeding in rem.

Again to an extent following the practice in admiralty, I think Bryan (and his sureties) are right in their position and that the Government is wrong. The bond having, as stated, taken the place of the car, the Government, in order to recover thereon, must prove the same facts that it would have been required to prove to obtain a judgment of forfeiture, and Bryan (and his sureties) may make the same defenses that Bryan would be entitled to make in such a forfeiture suit. *Besides, I think this view is in accord with the spirit of the National Prohibition Act."*

The bond, under Sec. 26, is essentially a guarantee to pay to the United States a penal sum. The amount recoverable is not that which is named in the bond, but is that sum of money which represents the value in the res of the guilty interest of the claimant. It is a sum assessed for violating the Prohibition Law.

U. S. v. *Friedman,* 8 Fed. Supp. 829, at 832.

It clearly involves the idea of punishment for infraction of the law,—the definite function of a penalty.

O'Sullivan v. *Felix,* 233 U. S. 318, 324;
Lipke v. *Lederer,* 259 U. S. 558, and

As stated in

U. S. v. *One Ford Coupe Automobile,* 272 U. S. at 325:

> "If Sec. 26 is the only applicable provision for forfeiture of the car, the interest of those who are innocent are not forfeited."

It is the illegal use with knowledge of the claimant that fixes a penalty and the amount thereof. These essential averments do not appear in the complaint. Nor may the guilty use or acquiescence therein be presumed as against the claimant.

U. S. v. *Choteau,* 102 U. S. 603;

And as stated in that case:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

The failure to re-deliver the vessel did not fix liability at the face value of the bond or at half thereof.

U. S. v. *Warnell, supra;*
U. S. v. *One Ford Automobile,* 18 F. (2) 338;
U. S. v. *Randall, supra.*

The cases of

Gulf States Steel Co. v. *U. S.,* 287 U. S. 232;
U. S. v. *John Barth,* 279 U. S. 370

have nothing in common with the case at bar.

The distinction between an estoppel which may be invoked to give validity to what the parties contemplate shall constitute an agreement between them and a repealer which ousts the Court of its jurisdiction is too clear to require any finespun argument.

In

U. S. v. *John Barth, supra,*

and that line of cases, the obligor wishes to hold off execution and gives the bond for that reason; the obligee understands that this delay of execution will not destroy liability. Nothing of that sort is presented in the case at bar. No penalty had arisen before the bond was given for the release of the vessel. Perhaps no penalty would ever arise. If it did however, the bond was to make certain that it should be discharged.

U. S. v. *Springer & Lotz,* 69 F. (2) 819.

If, as stated in

Daniels v. *Tearney,* 102 U. S. 415,

the bonds were statutory bonds, they would have been rendered void by reason of the invalidity of the statute and no recovery could be had on it. Furthermore, there is present in a repealer without a saving clause, the Legislative act of remission. This goes further than merely voiding the bond. It commands restitution even after collection of the penalty providing the judgment thereon had not become final.

Yeaton v. *U. S.,* 5 Cranch, 281, 3 Law Ed. 101.

The intervention of the repeal in the case at bar did not create a defense to the action, but deprived the Court of jurisdiction to exact the penalty under the bond. There is no similarity between the case at bar and those cases relied upon by the Government in which an estoppel was invoked. There is nothing unjust or inequitable in resisting a claim of forfeiture under the guise of an action on a bond when the Legislative will has expressed that no such forfeiture shall accrue. There is no unjust enrichment. The Congress has remitted the penalty. Furthermore there never was any adjudicated liability on the bond in suit.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that the judgment below be affirmed.

LOUIS HALLE,
Attorney for Respondent.

On the Brief,
MILTON R. KROOPF,
OTTO B. SCHMIDT.

April, 1935.

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SUPREME COURT OF THE UNITED STATES.

No. 693.—October Term, 1934.

The United States of America, Petitioner, vs. James A. Mack and Concord Casualty & Surety Company, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 20, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

On July 31, 1930, an American motor boat, the Wanda, had on board a cargo of intoxicating liquors. The Collector of the Port of New York seized the vessel and arrested the crew for an offense against the National Prohibition Act. Thereupon the respondent Mack claiming to be the owner of the vessel gave a bond as principal with the other respondent as surety in the sum of $2,200, double the value of the vessel, conditioned that the bond should be void if the vessel was returned to the custody of the Collector on the day of the criminal trial to abide the judgment of the court. A copy of the bond is printed in the margin.[1] The members of

[1] "Know all men by these presents, that I, James A. Mack, of No. 4 Hickory Street, Wantagh, Long Island, N. Y., principal and Concord Casualty and Surety Company, of No. 60 John Street, New York City, a corporation, organized and existing under laws of New York State, surety, are held and firmly bound unto the United States of America in the penal sum of two thousand two hundred and 00/100 ($2,200.00) dollars (double the value of the vehicle or conveyance), money of the United States, for the payment of which well and truly to be made we bind ourselves jointly and severally, our heirs, executors, administrators, successors, and assigns firmly by these presents.

"Whereas, the following described vehicle or conveyance has been seized pursuant to section 26 of title II of the National Prohibition Act, to wit: The American motor boat 'Wanda.'

"And, whereas, the aforesaid principal has made application for the return of said vehicle or conveyance, claiming to be the owner thereof:

"Now, therefore, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which

the crew were brought to trial on January 26, 1931, and upon a plea of guilty were sentenced. The vessel, however, was not returned by the owner, either then or at any other time, to the custody of the collector. Accordingly, on July 19, 1933, the United States of America filed its complaint against principal and surety to recover upon the bond, claiming $1,100, the value of the vessel, with interest from the date of the breach of the condition. A motion to dismiss the complaint was made in April, 1934, the defendants contending that through the repeal of the Eighteenth Amendment on December 5, 1933, liability on the bond had ended. The motion was granted by the District Court (6 F. Supp. 839), and the Court of Appeals for the Second Circuit affirmed. 73 F. (2d) 265. A writ of certiorari brings the case here. 294 U. S. —.

Penalties and forfeitures imposed by the National Prohibition Act for offenses committed within the territorial limits of a state fell with the adoption of the Twenty-first Amendment. *United States* v. *Chambers*, 291 U. S. 217. Our holding to that effect was confined to criminal liabilities, and had its genesis in an ancient rule. On the other hand, contractual liabilities connected with the Act continued to be enforcible with undiminished obligation, unless conditioned by their tenor, either expressly or otherwise, upon forfeitures or penalties frustrated by the Amendment. The courts below have held that liability upon the bond in suit was conditioned by implication upon the possibility in law of subjecting the delinquent vessel to forfeiture and sale, and that the possibility must be unbroken down to the recovery of judgment against the delinquent obligors. In opposition to that holding the Government contends that the bond is a contract to be enforced according to its terms; that liability became complete upon the breach of the express condition for the return of the delinquent vessel; and

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is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, and the said principal shall pay off any liens or encumbrances thereon except the following liens heretofore existing, namely: then this obligation to be void, otherwise to remain in full force and effect.

"Witness our hands and seals this 31st day of October 1930;

By JAMES A. MACK, *Principal*
Concord Casualty and Surety Company
By JOHN A. MANNING, *Resident Vice President*

"Attest: FRED M. NIELSEN, *Attorney in fact.*

"Approved this 1st day of November 1930.

H. C. STUART, *Assistant Collector.*"

that the liability thus perfected was not extinguished or diminished by the loss of penal sanctions. We think the Government is right.

By the provisions of the Prohibition Act an officer who seizes a vessel or other conveyance transporting intoxicating liquors must deliver it to the owner upon the execution of "a good and valid bond, with sufficient sureties, in a sum double the value of the property," to be approved by the officer and to be "conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court." National Prohibition Act, c. 85, 41 Stat. 305, 315, § 26; 27 U. S. C. § 40. No other condition is expressed in the statute. No other, we think, is to be implied. One of the essentials of jurisdiction *in rem* is that the thing shall be "actually or constructively within the reach of the court." *The Brig Ann*, 9 Cranch 289, 291; and see *Miller* v. *United States*, 11 Wall. 268, 294; *Strong* v. *United States*, 46 F. (2d) 257, 260. If the defendants had lived up to the requirements of the bond, the court would have been in a position after the plea of guilty by the crew to proceed against the vessel forthwith and in a summary way. *The Harbour Trader*, 42 F. (2d) 858. Without the presence of the vessel that opportunity would be lost. To give assurance that it would not be lost the bond was exacted by the statute and delivered by the owner. In the face of all this the argument is pressed that delay has extinguished the remedy on the bond by putting an end to the possibility of going against the boat. Thus the obligation is destroyed by force of the very contingency against which it was designed to give protection. We find no adequate reason for thus rewarding an offender. If the condition had not been broken, the Government would have received the value of the vessel, or at least that result would have ensued for anything to the contrary shown in this record. Principal and surety covenanted that in the event of such a default the bond should become payable according to its terms. They must be held to their engagement. Cf. *United States* v. *John Barth Co.*, 279 U. S. 370; *Gulf States Steel Co.* v. *United States*, 287 U. S. 32; *United States* v. *Hodson*, 10 Wall. 395, 409; *Daniels* v. *Tearney*, 102 U. S. 415.

We have said that the bond may not be read by a process of construction as subject to conditions not expressed upon its face. In saying that we have no thought to pass upon the quantum of a recovery thereunder. There are decisions of other courts to the

effect that the bond is one of indemnity, so that only the damages actually suffered by the omission to produce the boat for surrender at the appointed time will be owing upon default. See *United States* v. *Warnell*, 67 F. (2d) 831, 832; *United States* v. *Randall*, 58 F. (2d) 193, 194; cf. *United States* v. *Zerbey*, 271 U. S. 332, 340. If that is so, there is always the possibility of proving in mitigation or defense that the boat and those in charge of her were innocent, and hence there was no loss. We leave those questions open. It is one thing to show that if the boat had been on hand at the appointed time, no benefit to the Government would have resulted from her presence. Cf. *Taylor* v. *Taintor*, 16 Wall. 366, 369. It is quite another thing to show that there was damage at the date of breach, and damage for which the Government would have a remedy if the boat had been produced, but that owing to changed circumstances it would be useless to produce her now. Neither in the bond nor in the statute is there a disclosure of a willingness that the principal shall be thus permitted to take advantage of his wrong.

We are told that the bond is only a substitute for the vessel and hence is not enforcible unless there could be a decree *in rem* if the vessel were in court today. To speak of the bond as such a substitute is only a half truth. Undoubtedly the reason for the exaction of the bond was to put the government in as good a position as it would have occupied if the *res* had been present at the time of the criminal trial, but this is far from saying that liability was meant to be conditioned upon control of the *res* thereafter as a continuing possibility. A bond such as this one has very little analogy to a form of bond common in the admiralty whereby the stipulators become bound to "pay the amount awarded by the final decree." Cf. *The Belgenland*, 108 U. S. 153; *The City of Norwich*, 118 U. S. 468, 489. Upon a bond so conditioned the liability of the stipulators is inchoate until perfected by a decree for the disposition of the *res* or of the proceeds of the bond accepted as a substitute. Here, on the contrary, the remedy is at law by an action on a contract, and not *in rem* or *quasi in rem* as if a suit had been brought in admiralty or in equity. The existence or non-existence of a cause of action at law growing out of a civil liability having its origin in contract is commonly dependent upon the state of facts existing when the action was begun. There is nothing to bring this case within any recognized exception.

Both sides make much of the analogy supplied by the responsibility of bail. The analogy exists, though it is far from being complete. Its implications give support on the whole to the position of the government. At common law bail might be exonerated as of right by the surrender of their principal if their liability had not yet been "fixed." There was much learned disquisition as to the time when that event occurred. To avoid confusion of thought a distinction must be drawn between civil and criminal cases, for the function of bail in each is essentially diverse. *United States* v. *Ryder*, 110 U. S. 729, 736.

The rule in civil cases was that bail were not liable until a return of *non est inventus* to a *ca. sa.* against the principal. *Cholmley* v. *Veal*, 6 Mod. 304; *Bernard* v. *McKenna*, 3 F. Cas., No. 1348; *Pearsall* v. *Lowrence*, 3 Johns. 514; 1 Tidd's Practice, 237, 238.[2] Upon such return liability was fixed, but not definitively and beyond remission. A first writ of *scire facias* must have issued, and in certain contingencies an *alias* writ, before the bail were to be cast in judgment. *Kirk* v. *United States*, 137 Fed. 753, 755; *McCambs* v. *Feeter*, 1 Wend. 19; *Cumming* v. *Eden*, 1 Cow. 70; 2 Tidd's Practice, 1038, 1039, 1040. By the indulgence of the court they might surrender the principal until the return day of the last writ, after which their liability became definitive and absolute. *Mannin* v. *Partridge*, 14 East 599, 600; *Beers* v. *Haughton*, 9 Pet. 329, 358. But remission of liability, even within those limits, was matter of indulgence only. 1 Tidd's Practice, 238, 239; 2 *id.*, 1044. "To many purposes, the bail is considered as fixed by the return of the *ca. sa.*" Marshall, Ch. J., in *Davidson* v. *Taylor*, 12 Wheat. 604. If surrender was allowable thereafter the privilege was given "as matter of favour, and not as matter pleadable in bar." *Ibid.* The court would exercise a sound discretion. *Morsell* v. *Hall*, 13 How. 212, 215. Accordingly the practice was to treat the liability as absolute if the situation had so changed that the bail were no longer able to make an effectual surrender, as where before the return of the *scire facias* the principal had died. "All the cases agree, that after the bail are fixed, *de jure*, they take the risk of the death of the principal. . . . The time which is allowed the bail, *ex gratia*, is at their peril, and they must sur-

[2] ". . . the reason of it is, that I am not bound to render the principal till I know what execution the plaintiff will chuse; whether he will chuse to have his body, which he makes appear by suing a *capias*; for he might have sued an *elegit* or *fi. fa.*" Holt, Ch. J., in Cholmley v. Veal, *supra*, at p. 305.

render." Kent, Ch. J., in *Olcott* v. *Lilly*, 4 Johns. 407, 408. "In such a case the bail is considered as fixed by the return of the *ca. sa.*, and his [the principal's] death afterwards, and before the return of the *scire facias*, does not entitle the bail to an *exoneretur*." *Davidson* v. *Taylor*, *supra*. Cf. *United States* v. *Costello*, 47 F. (2d) 684, 686; *Detroit Fidelity & Surety Co.* v. *United States*, 59 F. (2d) 565, 568; 2 Tidd's Practice, 1044. To follow this analogy through in its application to the case at hand: the respondents are no longer able by a surrender of the vessel to neutralize the consequences flowing from their default. Surrender after condition broken was never a strict defense. It has ceased in the present circumstances to commend the offenders to favor and indulgence. The forfeiture must stand.

If from civil cases we pass to criminal, the argument from analogy becomes even weaker for the respondents, and stronger for the government. No longer is there need for a return to a *ca. sa.* The bail are bound at once upon the principal's default. "If the condition of the bail bond is broken by the failure of the principal to appear, the sureties become the absolute debtors of the United States for the amount of the penalty." *United States* v. *Zarafonitis*, 150 Fed. 97, 99; *United States* v. *Van Fossen*, 28 Fed. Cas., No. 16,607, at p. 358; *People* v. *Anable*, 7 Hill (N. Y.) 33. Collection may be enforced either by *scire facias* in the court which has possession of the record or by an ordinary suit in any other court of competent jurisdiction. *United States* v. *Zarafonitis*, *supra*; cf. *Davis* v. *Packard*, 7 Pet. 276, 285. True, an appeal *ad misericordiam* may result, as with civil bail, in a remission of the penalty. This power of remission has been exercised from distant times both in the English courts (*King* v. *Tomb*, 10 Mod. 278; *In re Pellow*, 13 Price 299) and here. *United States* v. *Kelleher*, 57 F. (2d) 684. For the courts of the United States it is now regulated by statute. R. S. § 1020; 18 U. S. C. § 601. One of the prescribed conditions is that a trial can still be had. This appears from the statute which is quoted in the margin.[3] The trial, of course, must be a

[3] "When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

Cf. New York Code of Criminal Procedure, §§ 595, 597.

reality, not the shadow of a name. At best, remission of the forfeiture is granted as an act of grace. The remedy for that reason is by motion or petition, not by answer and a plea in bar. *Detroit Fidelity & Surety Co.* v. *United States, supra,* at 568; *United States* v. *Costello, supra; Southern Surety Co.* v. *United States,* 23 F. (2d) 55; *United States* v. *Dunbar,* 83 Fed. 151; *Hardy* v. *United States,* 71 Fed. 158. The respondents do not appeal for grace, if it be assumed that grace has any place in the enforcement of such a liability as theirs. They defend upon the ground that the obligation is extinguished.

The point is faintly made that the government was at fault in failing to bring suit more promptly after the breach of the condition. The complaint was filed in July, 1933, while the Prohibition Act was still in force. Laches within the term of the statute of limitations is no defense at law. *Cross* v. *Allen,* 141 U. S. 528, 537; *Sprigg* v. *The Bank of Mt. Pleasant,* 14 Pet. 201, 207. Least of all is it a defense to an action by the sovereign. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735, 736; *Dox* v. *Postmaster General,* 1 Pet. 318, 325.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.